Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–320–91
MOHAMED YUSOFF, PEH SWEE CHIN AND EUSOFF CHIN SCJJ
25 MAY 1992

Civil Procedure *— Summary judgment — Appeal — Leave to defend — Whether triable issues raised — Rules of the High Court 1980 O 14*

Evidence *— Parol evidence rule — Existence of collateral agreement — Whether a collateral agreement can exist side by side with the main agreement which it contradicts — Whether evidence of surrounding circumstances and factual background admissible — Evidence Act 1950 s 92(b)*

Under a loan agreement, the respondent agreed to lend $6m to the first appellant for the purpose of restructuring the group borrowings of the first appellant and out of this sum, $1.5m was to be used for the purpose of working capital. The remaining appellants were the guarantors. The respondent averred that in breach of the agreement the appellants had failed to pay the interest due and consequently the respondent demanded repayment of the principal loan and interest thereon. The respondent applied for summary judgment under O 14 of the Rules of the High Court 1980 and this was granted as the learned judge held that there were no triable issues raised by the appellants in their defence. The appellants appealed and maintained that there existed a collateral agreement between the parties with regard to the drawdown of $1.5m that the sum would be used to service the interest accruing on a quarterly basis.

Held, allowing the appeal:

(1) The two letters relied upon by the appellants did not say clearly that the money disbursed were to be used to pay interest on the loan. But considering the amount and the dates of the drawdown shown in the letters coincided with interest as due and payable under the loan militates against the granting of an O 14 judgment, the court was of the view that it should be left to the trial judge to determine whether in the circumstances of the evidence as a whole those contemporaneous letters would amount to prior written consent of the lender within the meaning of the agreement.

(2) Section 92 of the Evidence Act 1950 ('the Act') did not absolutely bar the appellants from adducing evidence to vary the terms of the formal agreement between the parties. In this case the appellants had made certain averments regarding the arrangement of the parties on the purpose of the loan and the intent of the initial drawdown of $1.5m. These averments were questions of fact which cannot be determined on affidavit evidence alone. Evidence of the surrounding circumstances and factual background

were admissible and a collateral agreement could exist side by side with the main agreement which it contradicts.

(3) The law on collateral oral agreement was clearly spelt out in s 92(b) of the Act. It was recognized as one of the exceptions to the general rule forbidding extrinsic evidence to be adduced to contradict, vary, add to or subtract from, the terms of an agreement which had been reduced into the form of a document.

(4) In view of the fact that the facility granted by the respondent to the first appellant in this case was a term loan for three years, the court was of the opinion that an issue of law had also been raised for the determination of the court as to whether the demand for immediate payment was repugnant to the main purpose of the facility of the loan.

[Bahasa Malaysia summary

Di dalam kes ini tuntutan yang dibuat terbit daripada perjanjian pinjaman di mana responden telah bersetuju meminjam $6 juta kepada perayu pertama bagi maksud pembentukan semula pinjaman kumpulan perayu pertama dan dari jumlah itu $1.5 juta hendaklah digunakan untuk modal kerja. Perayu yang lain adalah penggerenti. Responden mendakwa bahawa dengan terjadi kemungkiran perjanjian itu perayu telah gagal membayar bunga yang kena dibayar dan oleh demikian responden telah menuntut pembayaran balik pinjaman utama dan bunga ke atasnya. Responden memohon mendapat penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 dan ini telah diberi oleh kerana hakim yang arif berpendapat bahawa tidak terdapat isu yang boleh dibicarakan yang ditimbulkan oleh perayu di dalam pembelaan mereka. Perayu telah membuat rayuan dan mempertahankan bahawa satu perjanjian kolateral wujud di antara kedua pihak itu berkenaan dengan pengeluaran $1.5 juta yang jumlah itu akan digunakan untuk membayar bunga berakru berdasarkan suku tahunan.

Diputuskan, membenarkan rayuan itu:

(1) Kedua-dua surat yang kepadanya perayu bergantung tidak menyatakan dengan jelas bahawa wang yang telah dibayar harus digunakan untuk membayar bunga atas pinjaman itu. Tetapi memandangkan amaun dan tarikh pengeluaran yang ditunjukkan di dalam surat itu bersesuaian dengan bunga yang kena dibayar di bawah pinjaman itu menghalang pemberian penghakiman A 14, mahkamah berpendapat bahawa seharusnya dibiarkan kepada hakim perbicaraan untuk memutuskan sama ada dalam keadaan keterangan seluruhnya surat sezaman itu sama seperti keizinan bertulis terdahulu pemberi pinjaman dalam maksud perjanjian itu.

(2) Seksyen 92 Akta Keterangan 1950 ('Akta itu') tidak secara mutlak menghalang perayu daripada mengemukakan keterangan untuk mengubah syarat-syarat perjanjian formal antara kedua pihak itu. Di dalam kes ini perayu telah membuat penegasan tertentu berhubung dengan persetujuan kedua pihak itu akan maksud pinjaman

itu dan tujuan pengeluaran permulaan $1.5 juta itu. Penegasan tersebut adalah soalan fakta yang tidak boleh diputuskan dengan keterangan melalui afidavit sahaja. Keterangan mengenai keadaan sekeliling dan latarbelakang fakta boleh diterima dan suatu perjanjian kolateral boleh wujud bersama dengan perjanjian utama yang ia menyangkal.

(3) Undang-undang mengenai perjanjian lisan kolateral telah ditentukan dengan jelas di bawah s 92(b) Akta itu. Ia telah diiktirafkan sebagai satu daripada kekecualian kepada rukun am melarang keterangan ekstrinsik dikemukakan untuk menyangkal, mengubah, menambah atau menolak daripada syarat-syarat perjanjian yang telah dibuat dalam bentuk dokumen.

(4) Memandangkan fakta bahawa kemudahan yang diberi oleh responden kepada perayu pertama di dalam kes ini adalah pinjaman bertempoh tiga tahun, mahkamah berpendapat bahawa suatu isu undang-undang telah ditimbulkan untuk pemutusan mahkamah sama ada tuntutan pembayaran serta-merta adalah bertentangan dengan maksud utama kemudahan pinjaman itu.]

Cases referred to

1 *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 (folld)
2 *Tan Swee Hoe & Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 (folld)
3 *Tan Chong and Sons Motor Co (Sdn) Bhd v Alan McKnight* [1983] 1 MLJ 220 (refd)
4 *Esso Petroleum Co Ltd v Mardon* [1976] 1 QB 801; [1976] 2 All ER 5; [1976] 2 WLR 583 (refd)
5 *Titford Property Co Ltd v Cannon Street Acceptance Ltd* (1975) Creswell Encyclopaedia of Banking Law pp 71–72 (refd)
6 *Williams & Glyn's Bank Ltd v Barnes* (1980) Creswell Encyclopaedia of Banking Law pp 72–73; [1981] Com LR 205 (refd)

Legislation referred to

Evidence Act 1950 s 92
Rules of the High Court 1980 O 14

Appeal from: Civil Suit No D1–23–2773–87 (High Court, Kuala Lumpur)

G Sri Ram (*Teh Meng Teck* and *Fiona Bodipalar* with him) (*Meriam Cheah Teh & Su*) for the appellants.

Loh Siew Cheang (*Ranjit Singh* with him) (*Cheang & Ariff*) for the respondent.

Cur Adv Vult

Mohamed Yusoff SCJ (delivering the judgment of the court): This appeal is against the decision of the learned judge granting an O 14 judgment to the plaintiff/respondent and holding that there is no bona fide triable issue raised by the defendants/appellants in their defence.

The claim arose from a loan agreement dated 4 September 1985 whereby the plaintiff agreed to lend $6m to the first defendant for the purpose of restructuring the borrowers' group borrowings and out of this sum, $1.5m was to be used for the purpose of working capital — cl 5.01(ii) of the agreement. The remaining defendants were the guarantors.

The amended statement of claim averred that in breach of the agreement the defendants failed to pay the interest due pursuant to cl 7.01 of the agreement and whereupon on 13 May 1987 the plaintiff demanded repayment of the principal loan and interest thereon.

The relevant part of the letter of demand states:

> In view of your default in the payment of interest and the bad conduct of your accounts with our clients, we are now instructed to terminate the loan agreement and demand the payment of loan disbursed and the interest due thereon amounting to $5,766,963.10 due as at 11 May 1987 of which particulars are given below:
>
> Particulars
>
> | | |
> |---|---|
> | Principal | $5,211,000 |
> | Interest | $ 533,259.62 |
> | Penalty interest | $ 22,703.48 |
> | | $5,766,963.10 |

As in the court below, the defendants argued before us that the loan granted by the plaintiff had a two-fold objective — the initial drawdown of $4.5m for the purpose of restructuring the first defendant's group borrowings whilst the remaining $1.5m was to service the payment of interests when due. They maintained that there existed a collateral agreement between the parties with regard to the drawdown of the $1.5m as represented to them by the then chief general manager of the plaintiff named Kung Beng Hung that the sum would be used to service the interest accruing on a quarterly basis.

In support of this contention the defendants referred to cl 5.01(ii) of the agreement and their correspondence with the plaintiff dated 26 November 1985 and 29 November 1985.

On behalf of the plaintiff/respondent it was argued that cl 5.01 of the agreement stipulated that the $1.5m loan was to be used for working capital and that prior written consent of the plaintiff was required for any other purpose. In the circumstances, the plaintiff contended that the defendants could not lead evidence to vary or contradict cl 5.01. In the alternative, the plaintiff contended that even if the defendants' contention that the $1.5m loan was to service interest of the first drawdown of $4.5m were admissible, the plaintiff was entitled to stop further disbursement of the $1.5m because overdues on certain existing accounts of the first defendants' group of companies had not been fully settled.

On these arguments the learned judge ruled that:

> Against this Kung Beng Hung (who is no more with the plaintiffs) has sworn an affidavit denying that he had been party to any such agreement.
>
> Now, as has been seen, cl 5.01(ii) of the loan agreement sets out that the $1.5m was for the purpose of working capital and the clause goes on to provide that if the money was to be utilized for any other purpose the prior written consent of the lender is required.

A In my judgment while it could very well be that there is nothing wrong with utilizing working capital to pay interest that may be due, unless there is admissible evidence of a clear agreement to the effect that the drawdowns were to be utilized to pay off interest the defendants' contention in this respect is unacceptable.

The two letters that the defendants rely on do not state that the money is B to be used to pay off interest. In any event the plaintiffs have rightly called to aid s 92 of the Evidence Act 1950 to contend that the defendants are precluded from adducing evidence to contradict or vary the terms of the formal agreement between the parties.

We agree with the learned judge that there is nothing wrong in utilizing C working capital for payment of interest due on the loan provided that consent of the lender was obtained under cl 5.01(ii) of the agreement. The clause provides:

> The proceeds of the loan shall be applied by the borrower or for the borrower's benefit as follows:
>
> D (i) a sum of ringgit four million five hundred thousand ($4,500,000) for the purpose of restructuring the borrower's group borrowings.
> (ii) a sum of ringgit one million five hundred thousand ($1,500,000) for the purpose of working capital.
>
> In the event that the borrower shall require to use the proceeds of the loan for any other purpose the borrower shall obtain the prior written consent of the lender. E

We also agree with the learned judge that the two letters do not say clearly that the money disbursed were to be used to pay interest on the loan. But considering the amount and the dates of the drawdown on a quarterly basis shown in the two letters coincided with interest as due and payable under the loan militates against the granting of an O 14 judgment, it is our view F this should be left to the trial judge to determine whether in the circumstances of the evidence as a whole these contemporaneous letters would amount to prior written consent of the lender within the meaning of cl 5.01(ii) of the agreement.

It is also our view that s 92 of the Evidence Act 1950 ('the Act') does not G absolutely bar the defendants from adducing evidence to vary the terms of formal agreement between the parties. As asserted in the affidavits of the defendants there had been negotiations between Kung Beng Hung, the previous general manager of the plaintiff on the purpose of the loan and the intent of the initial drawdown of the $1.5m on a quarterly basis. It is also averred by the defendants that when their true arrangement was not re- H flected in the agreement the defendants had raised certain queries and assurances were given by Kung to them.

These averments are questions of fact which cannot be determined on affidavit evidence alone. As demonstrated in the following authorities, evidence of surrounding circumstances and factual background are admis- I sible, and that collateral agreement can exist side by side with the main agreement which it contradicts.

The law on collateral oral agreement is clearly spelt out in s 92(b) of the Act. It is recognized as one of the exceptions to the general rule forbidding extrinsic evidence to be adduced to contradict, vary, add to or subtract from, the terms of an agreement which had been reduced into the form of

a document. In *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd*,[1] Mohamed Azmi FJ (as he then was) said:

> For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible. As against this, *evidence of surrounding circumstances and factual background have always been admissible.* (Emphasis added.)

In another case, *Tan Swee Hoe & Co Ltd v Ali Hussain Bros*,[2] which is generally considered as the leading authority on the matter, the appellants had orally agreed to allow the respondents to occupy the premises for as long as they wished upon payment of $14,000 as tea money. The written tenancy agreements were later executed by the parties but neither referred to the appellants' promise. A dispute arose between the parties and the appellants eventually sued for vacant possession. In their defence, the respondents claimed that under the oral agreement, they were entitled to stay as long as they wished and so long as they paid the rent regularly. The trial judge dismissed the appellants' claim and ordered them to register a lease in favour of the respondents for a term of 28 years. On appeal, it was argued for the appellants that evidence of the oral promise could not be given in view of ss 91 and 92 of the Act. Dismissing the appeal, Raja Azlan Shah CJ (as he then was) held:

> Although it is trite law that parol evidence is not admissible to add to, vary or contradict a written agreement, a technical way of overcoming the rule is by invoking the doctrine of collateral contract or collateral warranty.
>
> In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts. The classic statement on collateral contracts was made by Lord Moulton in *Heilbut Symons & Co v Buckleton* [1913] AC 30, 47 ... The case of *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129 and the subsequent applications of it has, in our opinion, fortified this not unfamiliar doctrine. We think Lord Denning MR summarized it in *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 All ER 65, 67:
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> > 'Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.'

In another case, *Tan Chong and Sons Motor Co (Sdn) Bhd v Alan McKnight*,[3] the respondent, an Australian national, wanted to purchase a car and get the benefit of exemption from duty in Malaysia and Australia. He would have obtained the exemption if the car was taken out of Malaysia and if it complied with the Australian design regulations. He agreed to purchase the car from the appellants and signed a buyer's order which contained a condition that no guarantee or warranty of any kind whatsoever was given by the company. The respondent maintained that he only agreed to pur-

chase the car on the representations of the appellants' salesman that the car conformed to the Australian design regulations. The car which was subsequently delivered to the respondent did not comply with the regulations and the respondent suffered loss, including the loss of the fiscal advantage of importing it duty free into Australia. In an action by the respondent for breach of warranty, the trial judge held that there had been a breach of warranty and general damages were awarded to the respondent. On appeal, Salleh Abas FJ (as he then was) in dismissing the appeal said:

> ... [The] first question to ask in this case is this: Was there a warranty and, if so, was it breached?
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> The word 'warranty' in the law of contract tends to be confusing as it may relate to a term of a contract, or to a separate enforceable promise which is collateral to a contract ...
>
> It is in the context of a collateral warranty that the respondent found his cause of action in this case ... For the purpose of determining whether these words and conduct amount to a warranty enforceable at the suit of the respondent, we can do no better than be guided by the test laid down by Lord Denning MR in *Dick Bentley Productions Ltd & Anor v Harold Smith (Motors) Ltd* [1965] 1 All ER 65, a test which he had followed and applied in subsequent cases ...

On the evidence, the court held that representations were in fact made by a salesman (a Mr Sze) employed by the appellants and who certainly had an ostensible authority to make such representations. The court further held that it would lead to 'a great mischief' in the law and certainly would not be in the interest of business efficacy if representations made by a salesman in the course of his employment could not be relied upon by an intending purchaser whom he was dealing with. With regard to the issue of admissibility of such pre-contract statements, Salleh Abas FJ further held (at p 229) that:

> There is this rule of evidence contained in s 92 of the Evidence Act to the effect that no oral evidence will be admissible to contradict, vary, add or subtract the terms of a written agreement unless the oral evidence comes within one of the exceptions or illustrations contained in the section ... We therefore hold that the oral representations made by Mr Sze were admissible.

In *Esso Petroleum Co Ltd v Mardon*,[4] the plaintiffs, an established oil company, found a site on a busy main street which they considered suitable for a filling station. One of their most experienced employees estimated that the potential throughput was likely to reach 200,000 gallons by the third year of operation. The defendant had a more realistic estimate, that of 100,000 to 150,000 gallons as being more likely; but his doubts were dispelled by his trust in the greater experience and expertise of the plaintiffs' employees and soon thereafter the parties entered into a written tenancy agreement for three years.

Despite his best endeavours, the defendant could not attain the promised sales volume and he lost money. In September 1964, intending to keep the station open and to lighten the defendant's financial burden, the plaintiffs offered the defendant a new tenancy agreement at a lower rental. Unfortunately the losses continued and when the defendant finally became unable to pay cash for the petrol the supplies were terminated. In December 1966, the plaintiffs claimed possession of the premises and moneys owed by the defendant. The defendant gave up possession in March 1967

but he counterclaimed for damages for breach of warranty and alternatively for negligent misrepresentation.

The trial judge held that the appellants' statement with regard to the estimated sales volume ('the potential throughput') was not a warranty as to give to the defendant a cause of action for breach of warranty. The judge, however, held that the plaintiffs were liable for negligent misrepresentation. On appeal by both parties, the Court of Appeal held that the statement made by the plaintiffs as to 'potential throughput' was a contractual warranty. Lord Denning MR held (at p 817) that:

> Ever since *Heilbut, Symons & Co v Buckleton* [1913] AC 30, we have had to contend with the law as laid down by the House of Lords that an innocent misrepresentation gives no right to damages. In order to escape from that rule, the pleader used to allege ... that the misrepresentation was fraudulent, or alternatively a collateral warranty. At the trial we nearly always succeeded on collateral warranty ... [There] have been many cases ... where we have readily held a representation — which induces a person to enter into a contract — to be a warranty sounding in damages. I summarized them in *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 All ER 65 ... In the present case it seems to me that there was a warranty that the forecast was sound, that is, Esso made it with reasonable care and skill. That warranty was broken ... For this they are liable in damages ...

Another issue dealt with by the learned judge was the reason for the plaintiff to suspend disbursements of the defendants' account on the ground that there existed an amount overdue on another loan between the parties. He ruled that this was a breach of cl 6.01(g) of the agreement which provides for full settlement of 'overdues on existing accounts'. From the records of proceedings it is apparent that the issue was only taken in the course of argument and that there is no such averment in the plaintiff's statement of claim nor notice given to the defendants of the breach. We feel that the defendants ought not to be shut out from raising their defences on the issue.

It has also been alluded to us that this is a term loan for a specified period of three years and it would be premature for the plaintiff to recall the loan mid-term until the full loan has been disbursed.

Clause 8.01 of the agreement expressly stipulates that the 'tenure of the loan shall be for the maximum period of thirty-six (36) months from the date of the first disbursement of the loan ...'. To ensure that the first defendant (the borrower) shall fully utilize the loan, cl 6.05 of the agreement states that 'The borrower shall pay a commitment fee of one percent (1%) per annum on the undrawn amount of the loan to the lender and such commitment fee shall be paid quarterly in arrears until the loan is fully disbursed.' The importance of this point becomes apparent when one considers the following decision in *Titford.*[5]

In an unreported decision of Goff J in *Titford Property Co Ltd v Cannon Street Acceptance Ltd*[5] on 22 May 1975, the defendant bank had granted term loan facilities to the plaintiffs. The letter granting the facility to the plaintiffs, stated that:

> We have pleasure in advising you of the terms and conditions upon which we are prepared to provide an overdraft facility in the maximum sum of Sterling pounds

A 248,000 for a period of 12 months to assist you in the purchase and development of the undermentioned freehold premises.

However, in each facility letter issued by the defendant bank to the plaintiffs, certain specific conditions of the loan were spelt out, amongst which was cl 9, which stipulated that: 'All moneys due by you, whether by way of B capital or interest, shall be payable on demand and you shall have the right to repay all moneys due without notice.'

In the face of this apparent contradiction in terms of the loan facility, Goff J said:

> It seems to me, where a bank allows an overdraft for a fixed time for a specific C purpose — whether the time be such as the parties think is required for the achievement of the purpose, or only the most the bank will allow, that time is binding on the bank; otherwise the customer might well be led into a disastrous position, as has happened here. The customer, on the faith of the bank's promise to a loan, an overdraft for a fixed term, commits himself and then finds the overdraft cut off, so that he cannot meet his liabilities, and in addition he had incurred indebtedness to the bank in respect of abortive expenditure. D

Holding that cl 9 was repugnant to the whole facility granted by the defendant bank, Goff J continued:

> [The bank] could not, in my judgment, with one hand grant a facility for a term for a purpose which to its knowledge clearly involves the plaintiffs in incurring E expenditure and liabilities, with a view to ultimate profit, and with the other take it away by an unqualified right to require repayment on demand at any time. In my judgment, therefore, I must modify cl 9, by reading it as subject to the provision as to the duration of this facility, or ignore it altogether.

Goff J's decision in *Titford Property*[5] was considered by Gibson J in *Williams & Glyn's Bank Ltd v Barnes*[6] in the following terms: F

> It is clear to me that Goff J decided that the true purpose of the agreement contained in the facility letter was to provide money to be laid out in a development project with a view to profit. A provision for repayment on demand was, he concluded, repugnant to that main purpose ...

G Gibson J did not specifically disagree with Goff J's decision in deciding the matter before him on the principle of repugnancy but said that he would prefer to decide the main object and intention of the transaction on point of construction of contract.

In view of the fact that the facility granted by the respondent to the first appellant in this present appeal is a term loan for three years, we are of the H opinion that an issue of law has also been raised for determination of the court as to whether the demand for immediate repayment made by the respondent on 22 May 1986 was repugnant to the main purpose of the facility of the loan.

In conclusion, we allow the appeal with costs, set aside leave to sign final judgment and order that the case be set down for trial. I

Appeal allowed.

Reported by Prof Ahmad Ibrahim